

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 13 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BEFORE THE  
Federal Communications Commission  
WASHINGTON, DC

In re Matter of )

Carriage of the Transmissions )  
of Digital Television )  
Broadcast Stations )

Amendments to Part 76 of the )  
Commission's Rules )  
\_\_\_\_\_ )

CS Docket No. 98-120

COMMENTS OF TELE-COMMUNICATIONS, INC.

WILLKIE FARR & GALLAGHER  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20036-3384  
(202) 328-8000

Its Attorneys

13 October 1998

024

## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY .....	1
I. TRANSITIONAL DIGITAL MUST-CARRY IS AN UNCONSTITUTIONAL SOLUTION IN SEARCH OF A PROBLEM. ....	4
A. Judicial Precedent Creates A Narrow Window For Must-Carry Regulation. ....	5
B. Turner II Establishes An Especially High Hurdle For Any Commission-Promulgated Must-Carry Regime. ....	6
C. A Transitional Digital Must Carry Rule Cannot Meet The Constitutional Standards Set Out In Turner I And Turner II. ....	8
1. Having invoked Section 614(b)(4)(B) as the basis for the proposed regulations, the Commission has assumed the burden of showing that transitional digital must-carry regulation is tailored to address the stated goals of Section 614. ....	8
a) Broadcasters are thriving under the existing regulatory framework. ....	10
b) There was and is no evidence of any actual or impending threat to broadcasters from a lack of transitional digital must-carry requirements. ....	11
2. Transitional digital must-carry rules will hinder, not advance, the deployment of digital technology. ....	14
a) The transition to digital is technologically complex. ....	14
b) Digital television faces substantial non- technical challenges. ....	15
c) Unnecessary government regulation will retard digital progress. ....	16
II. THE TRANSITIONAL DIGITAL MUST-CARRY RULES FAIL THE "NARROW TAILORING" REQUIREMENT. ....	18

**TABLE OF CONTENTS**  
(continued)

	<u>Page</u>
CONCLUSION .....	24

**BEFORE THE  
Federal Communications Commission  
WASHINGTON, DC**

In the Matter of	)	
	)	
Carriage of the Transmissions	)	<b>CS Docket No. 98-120</b>
of Digital Television	)	
Broadcast Stations	)	
	)	
Amendments to Part 76 of the	)	
Commission's Rules	)	
	)	
	)	

---

**COMMENTS OF TELE-COMMUNICATIONS, INC.**

Tele-Communications, Inc. ("TCI"), by its attorneys, respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

TCI is a leader in digital television. Through digital upgrades of its cable systems, non-video offerings such as the content-rich @Home Internet cable service, and active support of the cable industry's OpenCable™ initiative, TCI is demonstrating its commitment to rapid and efficient deployment of digital

---

<sup>1</sup> *In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, FCC 98-153 (rel. 10 July 1998) ("Notice").

technology.

TCI opposes the adoption of transitional digital must-carry rules because the potential negative effects of such rules on the constitutional rights, economic interests, and viewing opportunities of cable television operators, programmers, and subscribers outweigh any conceivable benefit that might flow from them. TCI believes that regulations compelling the carriage of broadcasters' digital signals during the transition from analog to digital would disrupt the dynamic, marketplace-driven evolution of digital video technology and inflict enormous harm on the ever-growing number of cable program services that must compete for the still limited capacity of cable systems. The consequent loss of diversity would greatly disserve the public interest.

Transitional digital must-carry rules are not only unnecessary but are also (1) contrary to the Communications Act and (2) unconstitutional. Congress did not direct or authorize the Commission to adopt the proposed transitional rules and did not intend that such rules be adopted. The only goals ever found constitutionally adequate to support must-carry would not be advanced or even implicated by the proposed transitional requirements.

Because the issue of constitutionality is so central to any contemplated must-carry scheme and because the pertinent constitutional analysis provides a useful framework for looking

at the entire set of questions presented in the Notice, TCI has organized its comments around the two fundamental questions that the courts have required the government to answer in connection with any must-carry scheme:

1. Is must-carry being advanced to solve a real and serious problem?
2. If so, is must-carry a reasonable and measured response to that problem?

As shown below, where the proposed transitional digital must-carry rules are concerned, the answer to each of these questions is "no".

Must-carry has traditionally been justified as a means to protect over-the-air broadcasters against the potential for economic harm that might occur if they were excluded from carriage on cable systems. As the Notice acknowledges, that concern is not at issue here: The existing must-carry rules ensure that all broadcasters have the opportunity to be carried on cable.<sup>2</sup>

Instead, must-carry is being considered here primarily in the untested hope that it might accelerate the public's acceptance of -- and purchase of hardware to receive -- digital television broadcast services. This is not a sufficient reason

---

<sup>2</sup> Neither the Notice nor this set of comments addresses the separate and distinct issue of must-carry after the transition to digital has occurred and the broadcasters have returned their analog spectrum.

to impinge on cable operators' First Amendment rights, particularly because there are alternative ways to facilitate the transition to digital television that do not restrict well-established constitutional rights. In fact, TCI submits that consumer acceptance of digital television can best be achieved if the marketplace is left to address consumer needs without government-imposed constraints. Successful introduction and acceptance of digital television will require extensive, industry-wide efforts to resolve complex technical and economic issues. Industry participants currently have strong incentives to work towards the resolution of those issues. Government intervention is likely to impose substantial costs and inefficiencies without in any way improving the incentives or the result. Such intervention should therefore be avoided.

For all of these reasons, TCI urges the Commission not to adopt transitional digital must-carry rules.

**I. TRANSITIONAL DIGITAL MUST-CARRY IS AN UNCONSTITUTIONAL SOLUTION IN SEARCH OF A PROBLEM.**

As the Commission acknowledges in the Notice, any must-carry regime is likely to have to withstand close constitutional scrutiny.<sup>3</sup> Since any rule that cannot withstand constitutional scrutiny will be invalid regardless of any other consideration, the constitutional issues provide an appropriate framework for analysis of the Commission's rulemaking proposal.

---

<sup>3</sup> Notice at ¶ 15.

**A. Judicial Precedent Creates A Narrow Window For Must-Carry Regulation.**

The Commission's past efforts to impose must-carry obligations on cable operators without explicit statutory direction have been uniformly rejected by the courts on First Amendment grounds. See *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988) ("*Century*"); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986) ("*Quincy*"). In the 1992 Cable Act, Congress provided an explicit must-carry mandate predicated on specific findings and judgments regarding the need at that time for such regulation. Those must-carry obligations, codified at 47 U.S.C. §§ 614 and 615, were ultimately upheld in *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174, 520 U.S. 180 (1997) ("*Turner II*"), as a permissible congressional response to particular problems identified by Congress.

In its first examination of the 1992 Cable Act must-carry requirements, the Court determined that those requirements were "content-neutral" regulations subject to "intermediate" First Amendment scrutiny under *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"). That required the government to show (1) that the must-carry regulations advanced a substantial governmental interest unrelated to the suppression of free speech

and (2) that the regulations were narrowly tailored to further that identified interest. *Id.* at 662. The Court remanded for fact-finding on these issues.

In *Turner II*, a 5-4 majority of the Court concluded that the goals specifically identified by Congress as the objects of those must-carry regulations were legitimate and substantial and that the statutory scheme adopted by Congress to achieve those goals was sufficiently narrow in its impact on the free speech rights of cable operators and programmers. The identified congressional purpose was the preservation of the existing structure of the free, over-the-air broadcast television medium in order to promote diversity and preserve fair competition in the market for television programming. *Turner II* at 1186; see also *Turner I*, 512 U.S. at 652. The Court understood that Congress wanted to "prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households", *Turner II* at 1188 (emphasis added), and to "preserv[e] a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable", *Id.* at 1189.

**B. *Turner II* Establishes An Especially High Hurdle For Any Commission-Promulgated Must-Carry Regime.**

The constitutional analysis prescribed in *Turner I* and applied in *Turner II* draws a significant distinction between a regulation explicitly imposed by Congress and one devised by a

regulatory agency. The Court required the government to show that Congress reached "reasonable inferences based on substantial evidence", *Turner I*, 512 U.S. at 666. Substantiality of the evidentiary basis for action where Congress has acted directly is to be measured "by a standard more deferential than we accord to judgments of an administrative agency." *Turner II*, 117 S.Ct. at 1189. Indeed, Congress has even suggested that signal carriage obligations could *only* be enacted pursuant to *congressional* authorization, not agency rulemaking.<sup>4</sup>

It is therefore important to emphasize -- as the Commission seems to acknowledge in the Notice<sup>5</sup> -- that Congress has neither mandated nor expressly directed the Commission to adopt any transitional digital must-carry requirement, much less the one actually raised in the Notice.<sup>6</sup> That circumstance requires the

---

<sup>4</sup> See 1992 Cable Act House Report at 58 (stating that Congress "recognize[d] that two previous versions of must-carry regulation *imposed by FCC rulemaking* were held unconstitutional by the United States Court of Appeals for the District of Columbia Circuit" but that these decisions did "not foreclose Congress from crafting valid regulations for cable carriage of local television signals.") (emphasis added).

<sup>5</sup> Notice at ¶¶ 12-13.

<sup>6</sup> See *id.* at ¶ 13. For example, the Commission properly does not cite in the Notice general provisions of the Act, such as Section 4(i), which are insufficient to authorize a transitional digital must-carry rule, particularly in light of the fact that Section 614 is a specific provision dealing with must carry. In fact, Section 614(b)(4)(B) addresses digital must carry and, as shown above, does not authorize such an obligation during the transition period. Had Congress intended a transitional digital must-carry obligation, it easily could have made that clear in the statute.

Commission to meet the tests for agency-initiated must-carry regimes established in *Century* and *Quincy*. In *Century*, the D.C. Circuit noted particularly that the usual deference to administrative agency expertise typical in judicial review of agency action under the Administrative Procedure Act ought not to be given where First Amendment freedoms are at stake. *Century*, 835 F.2d at 299. Therefore, the Commission has a heavier burden than Congress had to meet in *Turner II* to show that there is a sound basis to believe that transitional digital must-carry rules will serve a permissible governmental purpose in a narrowly tailored way.

**C. A Transitional Digital Must Carry Rule Cannot Meet The Constitutional Standards Set Out In *Turner I* And *Turner II*.**

- 1. Having invoked Section 614(b)(4)(B) as the basis for the proposed regulations, the Commission has assumed the burden of showing that transitional digital must-carry regulation is tailored to address the stated goals of Section 614.**

The Supreme Court found Section 614 to be constitutional because the legislative record supported the conclusion that "the economic viability of free local broadcast television and its ability to originate quality local programming [would] be seriously jeopardized" in the absence of must-carry obligations. *Turner II*, 117 S. Ct. at 1187. There is no evidence to support even a suspicion that free over-the-air television is in any

---

(continued)

jeopardy in the absence of the proposed transitional digital must-carry rules.<sup>7</sup>

The *Turner II* Court found that it was reasonable for Congress to conclude that the loss of cable carriage in the analog context threatened to decrease broadcasters' ratings and, ultimately, their advertising revenues and financial stability.<sup>8</sup> By contrast, there will be no time during the transition period when a broadcaster's analog signal will not be carried by a cable operator. Broadcasters retain the right to transmit their analog signals, which are eligible for must-carry, through the entire digital transition period (currently scheduled to end on 31 December 2006), thereby ensuring that broadcasters will be able to maintain whatever advertising revenues may be attributable to carriage on cable systems. Thus, there is no reason to suppose that any broadcaster's viability will be threatened during the transition period by the absence of a digital must-carry requirement.

---

<sup>7</sup> See *Quincy* at 1454-55 ("At least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured.")

<sup>8</sup> *Turner II* at 1196.

**a) Broadcasters are thriving under the existing regulatory framework.**

Digital transmission will transform the economics of broadcasting by dramatically increasing broadcasters' potential sources of new revenue through sources unrelated to cable carriage. To encourage the transition to digital broadcasting, existing broadcasters were given an additional 6 MHz of digital spectrum for free and were accorded unlimited flexibility by the Commission to use this digital spectrum for revenue-generating applications involving neither HDTV nor even free, over-the-air television. In the words of then-Chairman Hundt:

The new digital transmission of broadcast will be capable of many wondrous services. With one misnamed "channel" of six megahertz of spectrum, a tower here in Nashville could broadcast to every PC, telephone, computer, and television in the city simultaneously four or five TV shows, and a couple of software programs, and a newspaper, and a phone book, and movies for storage in the VCR (if VCRs still exist). If we gave out, say, five blocks of six megahertz each, we could enable five digital broadcasters to deliver 20 to 30 channels of programs. This could be local competition for cable. ... The digital transmission technology is so supple and flexible that the possibilities of serving the public interest are staggering. And the commercial possibilities are beyond the dreams of avarice. If digital broadcast gained just 10% of the advertising business in this country, it would increase today's TV revenues by half!<sup>9</sup>

---

<sup>9</sup> Reed Hundt, Chairman, Federal Communications Commission, Speech Before the Industry Leadership Conference, Information Technology Association of America, Nashville, Tennessee, 9 October 1995, at 4.

There can be no serious contention that digital must carry is necessary (or even desirable) during the transition period for a broadcast industry with that kind of current opportunities and future prospects.

Continued carriage of the broadcasters' analog feed during the transition period and new revenue streams afforded by the digital broadcast feed entirely foreclose the conclusion that digital must carry during the transition period is necessary to advance the sole governmental interest found sufficient in *Turner II* to justify Section 614: the preservation of free, over-the-air broadcasting.

- b) There was and is no evidence of any actual or impending threat to broadcasters from a lack of transitional digital must-carry requirements.**

When Section 614 was enacted in 1992, there was no evidence before Congress at all -- let alone substantial evidence -- supporting the imposition of transitional digital must-carry rules. Congress' findings supporting analog must-carry requirements are wholly irrelevant to transitional digital must carry. For example, the *Turner II* Court relied heavily upon Congress' findings (1) that local broadcasters had been dropped in the absence of must-carry rules<sup>10</sup>, and (2) that "broadcast stations had fallen into bankruptcy, curtailed their broadcast

---

<sup>10</sup> See *Turner II* at 1193 (stating that "between 19 and 31 percent of all local broadcast stations, including network affiliates, were not carried by the typical cable system.").

operations, and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems".<sup>11</sup>

To date, however, no local broadcaster's digital transmission has commenced and therefore no digital broadcast signal has been dropped or denied carriage. TCI and other cable operators are negotiating in good faith with broadcasters concerning carriage of their digital signals. Retransmission consent agreements in place with some broadcasters already provide for carriage of digital broadcasts at times and on terms that the broadcasters thought reasonable. Thus, there is no non-speculative basis for fear that the broadcasting industry (or even particular broadcasters) will suffer injury from cable noncarriage of their digital feeds during the transition period. Given the lack of any evidence -- much less substantial evidence -- demonstrating that broadcasters face an actual threat of non-carriage of digital broadcast signals, the Constitution prohibits the Commission's adoption of a digital must-carry rule.

The Commission essentially admitted in the Notice that there is no constitutionally sufficient basis for the proposed rules when it proposed to use this proceeding to "build a record" to "find" the important governmental interest to be served and the factual predicate supporting such a governmental interest.<sup>12</sup> The

---

<sup>11</sup> *Turner II* at 1195 (citations omitted).

<sup>12</sup> Notice at ¶ 16.

Notice both cites Section 614 as conferring authority to enact transitional digital must-carry regulations,<sup>13</sup> and admits that the congressional findings and evidence that underlie Section 614 do not support the proposed rules.<sup>14</sup>

The Supreme Court upheld Section 614 on the basis of a history that has no counterpart in the emerging new world of digital television. The transition to digital broadcasting is just beginning: Digital broadcasts are not set to start on a large scale until 1999, and consumers have only recently been able to purchase DTV receivers.<sup>15</sup> In comparison to the decades of experience with analog television that preceded the adoption of Section 614, the Commission's and the industry's experience with digital broadcasting is nonexistent. This state of affairs cannot be overcome through the submission of comments and reply

---

<sup>13</sup> See *id.* at ¶ 13.

<sup>14</sup> See *id.* at ¶ 16 ("[W]e find it essential to build a record relating to the interests to be served by any digital broadcast signal carriage rules [and] the factual predicate on which they would be based."). By contrast, Section 614 was enacted only after years of congressional fact-finding. When Congress contemplated legislating analog must-carry requirements, analog broadcasting was a well-established industry, more than 60 years old. Notwithstanding that the analog broadcast business was mature and the Congress familiar with it, three years of congressional hearings were held before enacting Section 614, and the District Court, after the Supreme Court's decision in *Turner I*, conducted an additional eighteen months of fact-finding.

<sup>15</sup> See, e.g., K. Pope and E. Ramstad, "HDTV Sets: Too Pricey, Too Late?" *Wall St. J.*, at B1 (7 Jan. 1998); J. Brinkley, "Ready or Not, Here Comes HDTV," *N.Y. Times*, at D1 (6 Apr. 1998).

comments in this rulemaking because the relevant events have not occurred and the relevant facts are only beginning to come into existence.

**2. Transitional digital must-carry rules will hinder, not advance, the deployment of digital technology.**

Even assuming that an interest in facilitating the transition from analog to digital television were a legitimate and sufficient basis to impinge on the First Amendment rights of cable operators and non-broadcast programmers, such an interest would not cure the constitutional defects inherent in a transitional digital must carry rule. This is because a transitional rule will, in fact, impede, rather than promote the transition to digital television.

**a) The transition to digital is technologically complex.**

Implementation of interactive broadband digital networks is, in general, extremely complex. The digital customer terminal is not simply a device that descrambles signals and passes them through to television sets and VCRs but, rather, is a highly sophisticated network computer that contains enormous amounts of processing power and memory. That complexity is necessary both to deliver video signals and also to deliver a wide array of interactive video, data, and telephony services to consumers. TCI and the cable industry have worked very hard through the OpenCable™ initiative to ensure that these new digital customer terminals will combine the best technology from a cross-section

of hardware and software providers at a reasonable price.

A very high level of technological sophistication and interconnectivity is required to integrate these digital customer terminals into cable systems, and the cable systems into the Internet and other networks. A web of computer servers, routers, switches, nodes, fiber-optic and coaxial cable, and gateways to other services, such as the Internet, must be integrated by the cable operator in order to launch digital services for consumers. These sophisticated networks are costly to build and require a high level of planning, design, and coordination to deploy. The broadcasters' digital networks also are complex. Given the unique characteristics of the two media, the integration of digital broadcast signals into digital streams of cable programming presents an array of technical challenges. Overcoming these challenges will not be facilitated by new regulatory requirements that impose new burdens and limit the available array of solutions to the existing problems.

**b) Digital television faces substantial non-technical challenges.**

The complexities associated with digital do not end with the network and the technology itself. There are equally challenging issues facing the cable and broadcast industries in the areas of marketing, consumer demand, cost, billing, and advertising, as well as on other fronts. For example, what digital services will consumers most highly demand? Will HDTV or multiplexed SDTV be preferred? How will advertising and customer billing change in a

world where digital technology allows the creation of highly targeted niche programming services, and where two-way networks facilitate consumer interaction with programming and advertiser content? These and other difficult questions will only be answered over time as digital services are rolled out to a broader audience and the results are analyzed.

**c) Unnecessary government regulation will retard digital progress.**

The digital networks TCI and others are building are not only sophisticated and complex; they are ever-changing. This dynamic will only intensify as the computer industry becomes more involved with cable and broadcasting technology.

Government regulation is bound to be particularly damaging when imposed upon industries undergoing a high level of technological change or where technology is at a nascent stage of development. Chairman Kennard recently recognized that this principle is fully applicable to digital television:

[T]he pace of the [digital] transition will be set by the private sector. And we in government should not set up the industry for failure by creating false expectations or, worse, micromanaging what you should do with this promising technology. ... The role of government is not to supply the business plan for digital TV. Or to put artificial limits on the industry's business plans.<sup>16</sup>

The Commission has adopted a market-based approach in other highly dynamic industries in order to avoid the potential that

---

<sup>16</sup> Remarks of William E. Kennard before the International Radio and Television Society, New York, N.Y. (15 Sept. 1998), at 3.

government intervention would freeze the current level of technology and stifle the development of new technologies.<sup>17</sup> TCI urges the Commission to follow the same course in the case of digital television.

Given the current state of the industry and the relevant technologies, there simply is no substantial governmental interest to be addressed by transitional digital must-carry rules. Indeed, there is substantial reason to believe that the proposed rules would be more likely to retard than to advance the evolution of digital broadcasting. That being so, there can be no constitutionally adequate justification for those rules.<sup>18</sup>

---

<sup>17</sup> For example, in the licensing of PCS, the Commission relied on the marketplace, concluding that rapid technological change in PCS development demanded such a flexible regulatory approach:

[M]ost parties recognize that PCS is at a nascent stage in its development and that imposition of a rigid technical framework at this time may stifle the introduction of important new technology. We agree, and find that the flexible approach toward PCS standards that we are adopting is the most appropriate approach.

See *PCS Second Report & Order*, FCC 93-451, at ¶ 137 (1993).

<sup>18</sup> TCI also believes that a digital must carry rules is inconsistent with the plain language of Section 614(b)(4)(B) and its underlying purposes. Section 614(b)(4)(B) clearly states that the Commission is authorized to do no more than modify its existing signal carriage requirements to "ensure cable carriage of *such broadcast signals* of local commercial television stations which have been changed to conform with such modified standards." See 47 U.S.C. § 534(b)(4)(B) (emphasis added). The phrase "such broadcast signals" refers to "television broadcast signals" which appears earlier in the provision. "Television broadcast signals", in turn, can only refer to those signals available in 1992 when Section 614(b)(4)(B) was adopted; i.e., analog broadcast signals. Likewise, the phrase "have been changed" can

## II. THE TRANSITIONAL DIGITAL MUST-CARRY RULES FAIL THE "NARROW TAILORING" REQUIREMENT.

Even if there were substantial evidence that transitional digital must-carry rules would serve an important or substantial governmental interest, the Commission would still have to show that such rules are "narrowly tailored", meaning that they restrict no more protected speech than is necessary to achieve their purpose.<sup>19</sup>

The Supreme Court's conclusion in *Turner II* that the analog must-carry regulations did not burden substantially more speech than necessary was based in significant part on the evidence that cable operators historically had carried most broadcast signals prior to the implementation of the rules.<sup>20</sup> That cannot be true

---

(continued)

only mean that the Commission may alter the must carry rules, if at all, only after the conversion to digital is complete. In short, the plain language of Section 614(b)(4)(B) shows that Congress intended the Commission to do no more than ensure cable retransmission of a high-quality broadcast signal after the conversion to digital is complete, not that the carriage requirement imposed on cable operators should be expanded to include an additional digital broadcasting signal during the transition period.

<sup>19</sup> See *Turner I* at 662.

<sup>20</sup> See *Turner II* at 1198 (noting that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry."). Similarly, Congress was encouraged to draft the analog must-carry legislation because "the great majority of the capacity of any cable system ... is unaffected by signal carriage regulations." See 1992 Cable Act House Report at 62. In other words, the burden on cable speech was relatively small.

with respect to digital broadcasting because, since there are no digital broadcast signals to carry, cable operators currently carry no digital broadcast signals. This means, of course, that each digital broadcast signal afforded mandatory cable carriage would represent a substantial increase over current digital broadcast carriage. That, in turn, would mean that cable operators' editorial discretion in selecting the programming services and combinations of services to offer the public would be far more dramatically affected by digital must-carry than it was by analog must-carry.<sup>21</sup>

Cable programmers' First Amendment rights and economic interests would also be severely affected by a digital must-carry requirement. Two-thirds of all cable subscribers today are served by systems that are "channel locked", meaning that the full channel capacity of the system is already being used.<sup>22</sup>

---

<sup>21</sup> The Supreme Court has repeatedly held that cable operators are "speakers" under the First Amendment. See, e.g., *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986) ("The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment.... Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable operators] seek[] to communicate messages on a wide variety of topics and in a wide variety of formats."); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'.") See also *Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689, at 707 (1979).

<sup>22</sup> 1997 Video Competition Report, 13 FCC Rcd 1304, at Tables F-3 and F-4 (1998).

While digital technology has helped to increase the number of channels available, the number of new programming services has increased at an even greater rate. There are now more than 172 non-broadcast video programming services from which consumers may choose, with another 77 services planned for launch by the end of 1998.<sup>23</sup> In the 1990s alone, programmers have invested more than 25 billion dollars in order to provide consumers the most advanced, highest quality programming available anywhere in the world.<sup>24</sup> For channel-locked systems, the requirement to carry a new digital broadcast service carries with it the requirement to drop a service currently carried on the system. That result would significantly harm both the video services involved and the consumers who have developed a strong loyalty to those services.

At the same time, many of the potentially displaced non-broadcast programmers have themselves invested substantial resources toward the conversion to digital. Discovery Networks, for example, recently launched, at significant expense, four new channels created specifically for digital television transmission (Discovery Kids, Discovery Civilization, Discovery Science, and Discovery Living). In 1997 alone, cable programmers invested over \$5 billion toward new services designed for the digital age.

---

(continued)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

These include multiplex premium services, such as HBO2 and HBO3; interactive services, such as the Sega Channel and video-on-demand movies; and new audio services providing CD quality sound over the cable wire. Non-broadcast programmers have become indispensable in developing the type of innovative programming which will drive consumer demand for digital television. A digital must-carry requirement that makes large portions of cable capacity unavailable to these programmers would severely undermine this important contribution to the digital transition.

For example, consider the potential impact of transitional digital must carry on an existing cable system, such as the Washington, DC, system operated by District Cablevision. The DC system serves over 100,000 subscribers. The system is channel locked. District Cablevision delivers 14 broadcast signals to its customers. A requirement that it carry all the digital services provided by all these broadcasters would mean that District Cablevision would have to drop 14 cable programming services that it currently provides to its customers. Since four major stations in Washington have already announced their intention to duplicate their analog programming on their digital broadcasts,<sup>25</sup> the result would be a net loss in existing program diversity.

This potential loss in program diversity and customer

---

<sup>25</sup> See P. Farhi, "Four Area TV Stations to Offer Digital Broadcasts", *Wash. Post*, at C11 (7 Oct. 1998).

service is particularly unjustified because, at present, only a small segment of the population -- high income, early adopters -- will have digital television sets. Given that digital television sets are expected to cost about \$7,000-\$10,000 initially, only a very small number of people will be able to afford them. Therefore, District Cablevision's 100,000 customers in Washington would lose access to 14 cable services so that a handful of high-income viewers can get duplicated broadcast content in digital format.

For every cable channel required by the government to be dedicated to a broadcast station's digital feed, one less channel is available for carriage of a cable programming network, which also may be offering a high-definition or digital television service desired by cable customers.<sup>26</sup> Such significant infringements of the First Amendment rights of cable operators and cable programmers are particularly unjustified given that there is no reason or basis to assume that cable operators will not carry digital broadcast programming that their subscribers desire.

Thus, the *Turner II* Court's reasoning concerning the burden

---

<sup>26</sup> For example, HBO plans to offer its customers an HDTV version of its programming in early 1999. See "SkyREPORT News for 8/26/98," <<<http://www.skyreport@mediabiz.com>>> (26 Aug. 1998). Furthermore, as noted, according to the Commission's own study, over 70 new national satellite cable programming networks are planned for 1998-99. See *Fourth Video Competition Report*, 13 FCC Rcd 1034, at Tables F-3 and F-4 (1998).